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Case Number 547,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WAYS	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 547, 2017
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

APPELLANT'S REPLY BRIEF

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Dated: June 18, 2018

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Argument I. Standing.

In the Answering Brief, the State argues for the first time that Brandon Ways did not have standing to claim that his privacy rights were violated by the GPS warrant.[1] There were numerous opportunities to make this argument prior to this stage of the case.

One reason the State was able to get the GPS warrant is because they convinced the issuing judge that Mr. Ways owned and controlled the Jeep and was using it for illegal purpose. In other words, they convinced the judge that Mr. Ways had standing.

The affidavits of probable cause for both the GPS warrant and the search warrant for the Jeep Cherokee provide the basis for the State's assertion that Brandon Ways had an ownership interest in the vehicle. (B-1 thru B-54) The GPS affidavit (B1 thru B-16) contains allegations that Defendants Ways and Mann were going to be obtaining a blue Jeep Cherokee. The affidavit also states that during the surveillance of the vehicle leading up to the warrant, Defendant Ways was seen operating the vehicle. The affidavit goes on to say that the vehicle was going to be outfitted with a secret apartment (which would certainly support a claim that he had an expectation of privacy). The affidavits assert that police surveillance

[1] Though the State is aware of the Court's three inquiries in *Lewis v. State*, 2018 WL 619706 (Del. Jan. 29, 2018), they chose not to respond to those inquires, and apparently decided to place most, if not all, their eggs in the "standing" basket.

"supports" that Brandon Ways uses the Jeep Cherokee in furtherance of his drug dealing activities. And it was the name "Brandon Ways" that appears in the warrants as the subject of the investigation of that vehicle.

That may explain why the State, in responding to Ways Omnibus Motion to Suppress (which sought, *inter alia*, to suppress the GPS warrant), did not argue that Mr. Ways lacked standing. (B-55 thru B73).

And that may explain why the prosecutor, when the issue of standing was eventually raised by her at an office conference on September 12, 2017, asserted that Mr. Ways was the owner of the vehicle and thus implicitly had standing. Instead, she challenged the standing of co-defendants Metelus and Mann (who had not yet pled guilty). According to her argument, Metelus lacked standing because she borrowed the car. As for Mann, she argued that he did not have standing because he was not operating the Jeep on the night in question and he was not named on the warrant. (B-74,75)

The State has also asserted that "Ways continuously has maintained that he did not own or control the Jeep, and he was not in the vehicle when it was stopped." In support of that assertion, the only thing the State can point to is the closing argument of Defense Counsel. The State has mischaracterized the defense closing argument. Defense Counsel did not assert that the Defendant had no

ownership interest in the car. Instead, Defense Counsel argued that the State did not present any evidence at trial proving that the Defendant owned or controlled the Jeep. (B-76 thru B-101) Other than that closing argument, the State is unable to cite any section of the Defendant's Omnibus Motion or been able to point to any comments made by Defense Counsel either before or during the trial in which the defense asserted that Ways did not own or control the Jeep.

By waiting until now to make the standing argument, the State has waived it. An issue not properly preserved at trial is waived for purposes of appeal. *Poteat v. State*, 840 A2d 599 (Del. 2003). The doctrine of waiver applies equally to the State as it does to the defendant. *Lopez-Vazquez v. State*, 956 A2d 1280, 1289 (Del. 2008). The State cites *Unitrin, Inc. v. American General Corp.* 651 A2d 1361, 1390 (Del. 1995) in urging the Court to make a ruling on standing even though it was never raised in Superior Court. But *Unitrin* makes clear that in order for this to occur, the standing issue must have been "fairly presented to the trial court." The State cannot assert at this stage that the issue of Mr. Ways' standing was fairly presented in the court below when they took the position throughout that he was the owner of the car.

Argument II. The Exclusionary Rule Applies.

The State's argument then shifts to probable cause and the exclusionary rule. The argument goes like this: Since the GPS warrant was issued with probable cause, the exclusionary rule does not apply. The State misses the point. In regards to the GPS warrant, we are not dealing with a probable cause issue, but a "scope of the search" issue. Article 1, Section 6 of the Delaware Constitution protects against searches which are excessive in scope. In this case, the State is defending a warrant which, based on their argument, gives the Delaware police the authority to track a car every minute of every day, in any state in the Country.

The State cites *Dorsey v. State*, 761 A2d 807 (Del. 2000) for the proposition that the exclusionary rule only applies in cases when there is no probable cause. (B-102). That take on *Dorsey* is misleading and limited to the facts of that particular case. What *Dorsey* stands for, and explicitly states, is this: "[E]xclusion is the constitutional remedy for a violation of the search and seizure protections set forth in Article 1, Section 6 of the Delaware Constitution." That section provides that "no warrant . . . shall issue without describing [the place to be searched] as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation." *Dorsey*, therefore, does not limit the exclusionary rule to probable cause infractions.

Argument III. Wiretap Law is Distinguishable.

The State asks the court to use wiretap law to decide this GPS monitoring case. A key distinction is that wiretap warrants are heavily regulated. 11 **Del. C.** Chapter 24. Only six people in the State are authorized to seek a wiretap warrant: the Attorney General, the Chief Deputy Attorney General, the State Prosecutor, or the Chief Prosecutor for each county. 11 **Del. C.** Section 2405. Wiretap warrant applications must contain a statement of need explaining that other investigative techniques have been tried and failed, or would be unlikely to succeed if tried. 11 **Del.C.** Section 2407(a)(3). And a wiretap order does not give police carte blanche to listen to the entirety of each and every phone conversation. 11 **Del.C**. Section 2407(e)(3).

For the most part, this is all set out in *State v. Brinkley*, 132 A3d 839 (Del. Super. 2016), on which the State has relied. *Brinkley* is also helpful in explaining the history of Federal and State wiretap laws. Congressional enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 set minimum standards for the interception of oral, wire and electronic communications during criminal investigations. "States were subsequently required to enact legislation that was at least as protective of citizens' rights as Title III." *Brinkley* at p.843. Delaware's responsive wiretap statute was patterned on the federal statute. 11 **Del.**

C. Sections 2401 – 2438. "In all material respects it is virtually identical." *Brinkley* at p. 843.

> "The only substantive differences between the federal statute and the Delaware statue concern jurisdictional boundaries. A federal judge may approve an interception "within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a federal court within such jurisdiction). The Delaware statute substitutes this language with subsections 2407(c)(2) and (3). These subsections allow a judge to approve an interception within the territorial jurisdiction of the court, and in certain cases for interception anywhere in the State so long as the offense being investigated transpired with the Court's jurisdiction.

Brinkley interprets that section as expanding jurisdiction to allow wiretap surveillance of phone calls occurring out of state so long as the listening post is in state.

Thus, state and federal wiretap statutes create a "contract/expand" dynamic on wiretap warrants. In some respects, these statutes impose limits on law enforcement by requiring minimization; by limiting the persons who may apply for a warrant; and by requiring exhaustion of other surveillance tactics. But in one key respect these statutes work to the make investigations easier for law enforcement by legislatively expanding the jurisdictional limits of the issuing courts. If law enforcement is able jump the statutory hurdles and obtain a wiretap warrant, they are then rewarded by having virtual nationwide jurisdiction for collecting data so long as they have an "in state" listening post.

The State cited *State v. Campbell*, 2014 WL 6725967 (Oh. Ct. App. Dec. 1, 2014) for the proposition that search warrant approved tracking of "cell phone pinging" is permitted outside the boundaries of Ohio. In that case, the Court based its ruling on clear legislative intent to extend the jurisdictional limits of Ohio court to permit this type of tracking out of state. The Defense submits that the legislative intent in Delaware points in the other direction – if the General Assembly wanted to extend the jurisdiction of the courts to permit tracking of GPS devices outside the Delaware boundaries, they would have included GPS tracking in the wiretap statute, or created a similar statute to cover GPS tracking.

Instead, the Delaware General Assembly "has specifically excluded tracking devices from that statute's applicability". *State v. Diaz*, 2013 Del. Super. LEXIS 530. The Defendant submits that since GPS surveillance is not covered by our wiretap statute, wiretap cases cited by the State which are decided under that statutory framework should not be used as precedent in this matter.

Unlike wiretap cases, there were no minimization limits to the surveillance in the instant case; a police officer applied for the warrant instead of an Attorney General; and the police were not required to show exhaustion of other surveillance tactics.[2] Yet the police were given the most expansive jurisdictional extension

[2] Which, to be fair, they did include in the affidavit.

imaginable - the police had their “high tech” eyes on this car all the time, everywhere.

Argument IV. The Scope of the GPS Warrant Far Exceeded Investigative Need.

But in the end, what we eventually learned at trial was this - the police really only wanted this GPS monitor to help them pounce when they got the big tip they were waiting for, which came on November 4, 2016. (B-103 thru B-116).

The police logistical effort on November 4th in response to that tip was formidable. An armada of police surveillance vehicles was assembled and deployed to track the Jeep Cherokee. And despite the large number vehicles, the manpower, and the surveillance techniques used by this fleet of police tracking vehicles, the police still lost track of the Jeep Cherokee in New Jersey. In reality, all the data gathered up to that point was meaningless to their investigation. This was the moment and this was the reason they needed the GPS monitor - in event they lost the vehicle during the night of the drug deal. Otherwise, the massive deployment of police manpower and equipment would have gone to waste.

This Court has been very wary of search warrants that do not limit surveillance. The Court has called for "particular sensitivity given the enormous potential for privacy violations that unconstrained searches" of cell phones and other forms of electronic data. With the GPS tracking in this case, the police knew the whereabouts of the car all day, every day, everywhere, from October 14, 2017 to

November 4, 2017. There was no minimization going on - this was needless data collection maximization for the police while they waited for the single reason they needed a GPS monitor on that car – to track it on the night of the drug deal.

In *Wheeler v. State*, 135 A3d 282 (Del. 2016) this Court reversed the defendant's conviction based on the overbreadth of the search warrant. The Court noted that the Constitutional search warrant requirement addresses two concerns. First, the warrant must meet the probable cause standard. Second, searches supported by probable cause must be "as limited as possible". In *Wheeler*, the issue wasn't probable cause, but the breadth of the search warrant. Because the search warrants there should have described the scope of the search with more particularity, the conviction was reversed. The evidence should have been suppressed by the trial court, as there is no good faith exception to the exclusionary rule in Delaware. (*Wheeler* at fn.122)

Even more recently, this Court has determined that "when the scope of a warrant so far outruns" the probable cause in the warrant, the evidence should be suppressed. *Buckham v. State*, 2018 Del. LEXIS 166 (Del. Apr. 17, 2018).

Argument V. Suppression Hearing Was Needed for "Inevitable Discovery".

The issue of inevitable discovery was never tested at a suppression hearing and inevitable discovery was not an issue being litigated at trial. Defense counsel would have had a different strategy for questioning the police witnesses at a suppression hearing than the strategy used at trial for questioning police officers on other issues. As a result, this Court does not have a fully developed record to make a judgment about inevitable discovery. The attorneys for the both sides in this matter recognized that this should have been fleshed out in a pretrial suppression hearing, as evidenced by their letters to the trial judge. (B-117, 118, 119)

The State now takes the position this Court should accept the trial testimony of Detectives Callaway and Cowden, as well as information contained in a letter the prosecutor wrote to the judge dated September 22, 2017 to perform its own inevitable discovery analysis. In that letter, the prosecutor asserted the following: (B-120,121)

> If GPS tracking had not been available, other methods of physical surveillance would have been employed in order to physically track the Jeep Cherokee. Officers have advised that they would have moved south and lined the southbound highways from the Delaware Memorial Bridge Down Routes 1 and 13 to Seaford, DE.

(B-120,121)

In essence, the State wants the Court to believe that police surveillance was so completely foolproof that they simply couldn't have failed to stop the Jeep Cherokee once it returned to Delaware. But in the end, one fact was elicited at trial which sinks the State's inevitable discovery claim - on the night of November 4, 2016, the police had upwards of a dozen tracking vehicles following this car ***and they still lost it.*** (B-122 thru B-144) And they would not have found it had it not been for the GPS tracking device.

Argument VI. State's Failure to Prove Venue.

As to this issue, The Defendant is content to rely on the facts, authorities, and argument as set out in his Opening Brief. The issue is not waived.

Respectfully submitted,

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